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No. 76-1157

In the Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHWESTERN BELL TELEPHONE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the district court exceeded its power in authorizing the government to use a pen register and in ordering petitioner to provide facilities and technical assistance necessary to carry out the pen register order.

On July 26, 1976, Judge H. Kenneth Wangelin of the United States District Court for the Eastern District of Missouri issued an order (Pet. App. A-29 to A-30) authorizing FBI agents to install a pen register[1] upon a

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[1]A pen register is a mechanical device that indicates when the telephone receiver is removed from the hook, and records the numbers dialed (Pet. App. A-1). Petitioner's statement (Pet. 21) that touch-tone decoders, which are similar to pen registers but are used on telephones having touch-tone dialing systems, "hear" the touch-tone sounds is incorrect. Touch-tone decoders simply respond to changes in electrical impulses, in the same manner as pen registers. Although petitioner

specified telephone based on his finding that there was probable cause to believe the telephone was being used in the commission of a racketeering offense in violation of federal law (Pet. App. A-2). The order authorized the use of a pen register until the telephone numbers of outgoing calls dialed from the subject telephone led to the identification of the persons committing the offense or until thirty days had elapsed from the date of the order, whichever occurred first (Pet. App. A-30). As part of the order, Judge Wangelin directed that petitioner Southwestern Bell Telephone Company, a wholly owned subsidiary of AT&T,[2] "shall furnish the applicant forthwith all facilities including lease lines, information, including the identification of leased line pairs, subscriber pairs and the location of a suitable junction box where a connection can occur, and technical assistance necessary to accomplish the interception unobtrusively," with compensation to be paid the company at the prevailing rates (Pet. App. A-30).

The district court, on the government's application, issued an order to show cause why the telephone company should not be held in contempt for refusing to comply with the pen register order (Pet. App. A-21); petitioner moved the district court to reconsider its pen register order and to remove petitioner from its provisions (Pet. App. A-22). On July 30, 1976, the district court denied the company's motion and held petitioner in contempt, although it

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correctly states (Pet. 21) that a volume unit meter would indicate that a conversation was in progress (but would not monitor the content of the conversation), neither pen registers nor touch-tone decoders come equipped with such meters; the addition of a volume unit meter to the pen register here would violate the court's order.

[2]Moody's *Public Utility Manual* 1941, 1946 (1976).

imposed no sanctions and stayed compliance with the pen register order pending appeal (Pet. App. A-18 and A-19). Petitioner appealed, and the court of appeals affirmed, with one judge dissenting (Pet. App. A-1 to A-15; 546 F. 2d 243).[3]

The questions presented by petitioner in this case are currently before the Court in *United States* v. *New York Telephone Company*, No. 76-835, certiorari granted, January 25, 1977. The only question presented in our petition in *New York Telephone Company* was whether a district court could order the telephone company to assist in implementing a valid pen register order. Respondent raised, in defense of the result reached below, the alternative ground that the district court had no authority to order the installation of pen registers except pursuant to 18 U.S.C. 2518. As we noted in our brief in *New York Telephone Company* (*id.* at 16-18),[4] we believe the Court has discretion to decide that issue, since acceptance of respondent's arguments would not change the ultimate result reached below. Cf. *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*, 426 U.S. 479; *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2. There is, accordingly, no need for this Court to afford plenary review of this case in order to reach the question of the propriety of the issuance of pen register orders without compliance with 18 U.S.C. 2518.

It is therefore respectfully submitted that consideration of this petition should be deferred pending this Court's

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[3]The court of appeals noted that it considered the finding of contempt "questionable" (Pet. App. A-3 n. 4).

[4]We are sending a copy of our brief to petitioner in this case.

decision in *United States* v. *New York Telephone Company*, No. 76-835.

WADE H. McCREE, JR.
Solicitor General.

APRIL 1977.

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